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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

EMPLOYERS INSURANCE COMPANY OF WAUSAU, Plaintiff and Respondent, v. PACIFIC EMPLOYERS INSURANCE COMPANY, Defendant and Appellant.	B204712 (Los Angeles County Super. Ct. No. BC290354)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter D. Lichtman, Judge. Affirmed in part; reversed in part.

Berman & Aiwasian, Deborah A. Aiwasian and Bruce N. Telles for Defendant and Appellant.

Dorsey & Whitney, Steven D. Allison and Robert E. Cattanach for Plaintiff and Respondent.

I. INTRODUCTION

This is an action by an insurer for equitable contribution from a coinsurer in the defense of asbestos exposure bodily injury claims against the insured. Defendant, Pacific Employers Insurance Company, appeals from a judgment in favor of plaintiff, Employers Insurance Company of Wausau. Defendant asks this court to recognize a rule that would permit it to avoid its share of the defense burden by separately settling with the insured. We decline to do so. We affirm a summary adjudication order which resolves equitable duties but reverse the summary judgment which resolved damage questions.

II. BACKGROUND

Plaintiff and defendant both at times provided primary comprehensive general liability insurance coverage to The Scotts Company (Scotts) either directly or through its parent corporation. Plaintiff insured Scotts for five consecutive years from October 1, 1968 to December 31, 1973. The insurance available under plaintiff's policies totaled $11.5 million. Defendant insured Scotts for eight consecutive years from December 31, 1977, to January 1, 1986. Each of defendant's eight policies had a $2 million per occurrence limit and a $10 million aggregate limit. The insurance available under defendant's policies totaled $80 million.

In December 2000, defendant and Scotts entered into a settlement agreement and release of claims. Scotts agreed to terminate all of defendant's insuring obligations in return for a $325,000 payment. The Appellate Division of the New York Supreme Court affirmed a trial court finding the settlement agreement and release was valid and enforceable. (*The Scotts Company, LLC v. Ace Indemnity Insurance Company* (2008) 858 N.Y.S.2d 121, 122-123.)

Scotts was subsequently named as a defendant in more than 200 lawsuits alleging bodily injury caused by asbestos exposure. Those lawsuits generally did not allege specific dates of exposure. On February 13, 2003, Scotts filed a coverage action against plaintiff. On July 14, 2005, plaintiff filed a cross-complaint seeking contribution from defendant. On or about February 24, 2006, plaintiff entered into a settlement with Scotts. Plaintiff agreed to pay certain of Scotts's defense and indemnity costs.

Following its settlement with Scotts, plaintiff moved for a summary adjudication that defendant had an equitable duty to contribute to the Scotts litigation defense and indemnity costs. On December 18, 2006, the trial court ruled: defendant had an equitable duty to contribute and reimburse plaintiff for defense costs incurred in the Scotts litigation; defendant's obligation extended to all lawsuits alleging exposure to Scotts's asbestos-containing products prior to or during defendant's policy periods or where no exposure date was specified; and defendant was responsible for 87.4 percent of the defense costs. The trial court allocated the defense costs based on the parties' aggregate policy limits and years of coverage or "time on the risk." The $80 million in coverage available under defendant's policies was 87.4 percent of the $91.5 million total available policy limits.

Plaintiff subsequently sought a summary judgment as to the dollar amount of defendant's contribution. On October 17, 2007, the trial court entered summary judgment requiring defendant to pay: $10,277,735.70 in past defense costs, $458,633.76 in prejudgment interest, and 87.4 percent of all future defense costs plus prejudgment interest at a rate of 7 percent. This appeal followed.

III. DISCUSSION

A. Preliminary Considerations

1. Standards Of Review

There are two applicable standards of review. The summary issue adjudication and judgment rulings are subject to de novo review. (*State v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018 [summary judgment]; *Drouet v. Superior Court* (2003) 31

Cal.4th 583, 589 [summary issue adjudication]; *London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 655 [summary issue adjudication].) Ordinary rules of contract interpretation apply to the insuring agreements. (*County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406, 414; *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 35-36; *London Market Insurers v. Superior Court, supra,* 146 Cal.App.4th at pp. 655-656.)

2. The Continuous Trigger of Coverage Theory

To put this case in context, we begin by describing the trigger of coverage theory applicable in asbestos exposure bodily injury cases. "Trigger of coverage" is a legal term of art. The Court of Appeal has explained: "The word 'trigger' is not found in the insurance policy or defined in the Insurance Code. ([Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2006) ¶ 7:161, p. 7A-66.)] It describes what must happen during the policy period to activate the insurer's duties to defend and indemnify. (*Ibid.,* citing *Montrose* [*Chemical Corp. v. Admiral Ins. Co.* (1995)] 10 Cal.4th [645,] 655.) The trigger of coverage usually determines which insurance policy or policies may provide coverage. (Croskey et al., [Cal. Practice Guide: Insurance Litigation,] *supra,* at ¶ 7:162, p. 7A-67.)" (*Stonelight Tile, Inc. v. California Ins. Guarantee Assn.* (2007) 150 Cal.App.4th 19, 35; accord, *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra,* 45 Cal.App.4th at p. 39.) Continuous or repeated exposure to asbestos over time results in bodily injury that is continuous or progressively deteriorating, often over several insurance policy periods. (*Stonelight Tile, Inc. v. California Ins. Guarantee Assn., supra,* 150 Cal.App.4th at pp. 35-36; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra,* 45 Cal.App.4th at pp. 43-45.) Given the nature of the injury, the Courts of Appeal have held there is a continuous trigger of coverage; that is, all comprehensive general liability policies in effect from the first exposure to asbestos through latency and manifestation of the disease and continuing until death are triggered. (*Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., supra,* 45 Cal.App.4th at pp. 43-45; cited with approval in *Aerojet-General Corp. v. Transport Indem. Co.* (1997) 17 Cal.4th 38, 57, fn. 10; see *Montrose Chemical Corp. v. Admiral Ins. Co., supra,* 10 Cal.4th at p. 676-677 & fn. 16; accord, *Owens-Illinois, Inc. v. United Ins. Co.* (N.J. 1994) 650 A.2d 974, 993-995; *J.H. France Refractories Co. v. Allstate Ins. Co.* (Pa. 1993) 626 A.2d 502, 507.)

B. The Equitable Contribution Duty And The Effect Of A Settlement Between One Insurer and the Insured

Plaintiff seeks equitable contribution from defendant. Equitable contribution is the right to recover from a co-obligor. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1080; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293 (*Fireman's Fund*).) It is codified in Civil Code section 1432 which states, "[A] party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." This right typically arises in the insurance context when two or more insurers are obligated to defend or indemnify the same loss or claim. The Civil Code section 1432 issue arises when one insurer has assumed the responsibility without participation by the other coinsurer or coinsurers. (*Continental Cas. Co. v. Zurich Ins. Co.* (1961) 57 Cal.2d 27, 36-37; *Fireman's Fund, supra*, 65 Cal.App.4th at pp. 1293-1294.) The doctrine applies to insurers sharing the same level of obligation on the same risk to the same insured. (*Travelers Casualty & Surety Co. v. American Equity Ins. Co.* (2001) 93 Cal.App.4th 1142, 1151; *Fireman's Fund, supra,* 65 Cal.App.4th at p. 1294, fn. 4.)

Equitable contribution is sometimes confused with equitable subrogation, but the two doctrines are legally distinct. (*Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1067; *Employers Ins. Co. of Wausau v. Travelers Indemnity Co.* (2006) 141 Cal.App.4th 398, 404 (*Employers Ins. Co.*); *Fireman's Fund,* *supra,* 65 Cal.App.4th at pp. 1291-1297.) In the insurance context, subrogation places the insurer in the position of the insured in order to pursue a recovery from a third party legally responsible for the insured's loss. (*Crowley Maritime Corp. v. Boston Old Colony Ins. Co., supra,* 158 Cal.App.4th at p. 1067; *Fireman's Fund, supra,* 65 Cal.App.4th at pp. 1291-1292.) A contribution claim, on the other hand, is not dependent on nor is it limited by the insured's rights. (*RLI Ins. Co. v. CNA Cas. of California* (2006) 141 Cal.App.4th 75, 84; *Fireman's Fund, supra,* 65 Cal.App.4th at p. 1289.) Instead, an insurer possesses a direct cause of action for equitable contribution against a coinsurer. (*RLI Ins. Co. v. CNA Cas. of California*, *supra*, 141 Cal.App.4th at p. 84; *Fireman's Fund*, *supra*, 65 Cal.App.4th at p. 1289.) The Court of Appeal has explained: "[Equitable contribution] is the right to recover, not from the party *primarily* liable for the loss, but from a *co-obligor* who *shares* such liability with the party seeking contribution. In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others. Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk." (*Fireman's Fund, supra,* 65 Cal.App.4th at 1293-1294; fns. omitted; see *Monticello Ins. Co. v. Essex Ins. Co*. (2008) 162 Cal.App.4th 1376, 1385.)

In *Fireman's Fund,* the Court of Appeal explained the "commonsense principle" on which the equitable contribution doctrine rests: "[The right to equitable contribution] is predicated on the commonsense principle that where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant, and no indemnitor should have any incentive to avoid paying a just claim in the hope the claimant will obtain full payment from another coindemnitor. (*California Food Service Corp. v. Great American Ins. Co.* [(1982)] 130 Cal.App.3d [892,] 901-902; 16 Couch on Insurance [(2d ed. 1983)] Contribution & Apportionment, § 62:151, pp. 621-622.) Equitable contribution thus assumes the existence of two or more valid contracts of insurance covering the particular risk of loss and the particular casualty in question. The fact that several insurance policies may cover the same risk does not increase the insured's right to recover for the loss, or give the insured the right to recover more than once. Rather, the insured's right of recovery is restricted to the actual amount of the loss. Hence, where there are several policies of insurance on the same risk and the insured has recovered the full amount of its loss from one or more, but not all, of the insurance carriers, the insured has no further rights against the insurers who have not contributed to its recovery. Similarly, the liability of the remaining insurers *to the insured* ceases, even if they have done nothing to indemnify or defend the insured. They *remain* liable, however, for contribution to those insurers who have already paid on the loss or for the insured's defense. (16 Couch [on Insurance], *supra*, Contribution & Apportionment, § 62:1, pp. 433-435.)" (*Fireman's Fund, supra*, 65 Cal.App.4th at p. 1295, fn. omitted.)

Our courts have rejected a contrary rule for sound reasons. In *Continental Cas. Co. v. Zurich Ins. Co., supra,* 57 Cal.2d at page 37, the Supreme Court observed: "[I]t is our view that all obligated carriers who have refused to defend should be required to share in costs of the insured's defense, whether such costs were originally paid by the insured himself or by fewer than all of the carriers. A contrary result would simply provide a premium or offer a possible windfall for the insurer who refuses to defend, and thus, by leaving the insured to his own resources, enjoys a chance that the costs of defense will be provided by some other insurer at no expense to the company which declines to carry out its contractual commitments." In *Fireman's Fund,* the Court of Appeal expanded on the point stating: "[A contrary rule] would actually encourage primary insurers covering the same risk to delay responding to an insured's tender of defense or request for indemnification until some other carrier accepts the tender, in the hope of subsequently making a more advantageous settlement with the insured. The outcome of a given case could be made to depend on such chance factors as which insurance carrier the insured happened to tender its defense to first, or the insured's willingness to pursue its rights against a recalcitrant insurance carrier, rather than each carrier's actual obligation under its individual contract with the insured to provide coverage and a defense. By such fortuities, one insurance carrier could be unfairly relieved of its rightful obligations while another insurer was burdened with the entire loss and deprived of its right to contribution, in derogation of the public policies of encouraging insurers to assume their duty to defend and promptly indemnify their insureds in good faith." (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1297.)

It bears emphasis the contribution doctrine is intended to do equity. The Court of Appeal has held, "The purpose of this [equitable contribution rule] is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others. (Civ. Code, § 1432; *Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369; *Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65 Cal.App.4th 21, 26-27; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1390; *California Food Service Corp. v. Great American Ins. Co., supra,* 130 Cal.App.3d at pp. 901-902; 16 Couch on Insurance, *supra,* Contribution & Apportionment, § 62:142, at pp. 611-612.)" (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1294; accord, *Employers Ins. Co., supra*, 141 Cal.App.4th at p. 404.)

1. The *Fact* of the Settlement

Defendant does not dispute that it was a coinsurer of Scotts. Defendant contends, however, that the December 2000 settlement with Scotts extinguished any equitable contribution obligation owed to plaintiff. Defendant asserts that for an equitable contribution duty to arise, the coinsurer's obligation to the insured must be equal, concurrent, present, and ongoing. In other words, defendant asserts the coinsurer's duty to defend and indemnify the insured must exist at all times during which the insurer incurred or paid the costs for which contribution is sought. Defendant argues the underlying lawsuits arose *after* it settled with Scotts. When the settlement occurred, plaintiff owed no debt that was then equally and concurrently owed by defendant. Thus, according to defendant, a contribution obligation cannot arise in the complete absence of any obligation to defend or to pay insurance benefits. As explained below, we disagree.

The Courts of Appeal have held that one insurer's settlement with the insured is not a bar to an equitable contribution action by a coinsurer. (*Employers Ins. Co., supra,* 141 Cal.App.4th at p. 404; *Fireman's Fund, supra,* 65 Cal.App.4th at p. 1289; accord, *Maryland Cas. Co. v. W.R. Grace & Co.* (2d Cir. 2000) 218 F.3d 204, 210-211 [applying New York law]; see 15 Couch on Insurance, *supra,* § 218.29.) This is because the duty to contribute is an equitable one that arises between insurers and is not dependent on the contractual relationship with the insured. (*Dart Industries, Inc. v. Commercial Union Ins. Co., supra,* 28 Cal.4th at p. 1080; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Company, supra,* 45 Cal.App.4th at pp. 105-106.) In *Fireman's Fund,* the Court of Appeal held: "[W]here two or more insurers independently provide primary insurance on the same risk for which they are both liable for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer or insurers, without regard to principles of equitable subrogation. As a corollary to this principle, we hold that one insurer's settlement with the insured is not a bar to a separate action against that insurer by the other insurer or insurers for equitable contribution or indemnity." (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1289.) In *Employers Ins. Co.,* the Court of Appeal agreed with *Fireman's Fund*. (*Employers Ins. Co., supra,* 141 Cal.App.4th at p. 404.) As the Court of Appeals for the Second Circuit explained in *Maryland Cas. Co. v. W.R. Grace & Co., supra,* 218 F.3d at pages 210-211: "Contribution rights, if any, between two or more insurance companies insuring the same event are not based on the law of contracts. This follows from basic common sense because the contracts entered into are formed between the insurer and the insured, not between two insurance companies. Accordingly, whatever rights the insurers have against one another do not arise from contractual undertakings. By the same token, the contract of settlement an insurer enters into with the insured cannot affect the rights of another insurer who is not a party to it. Instead, whatever obligation or rights to contribution may exist between two or more insurers of the same event flow from equitable principles. [Citations.]" The circuit court emphasized that where several insurers cover the same risk, and all have settled with the insured, their contribution rights vis a vis each other must be resolved by a court of equity exercising jurisdiction over the entire controversy. (*Id.* at p. 211.)

Under *Fireman's Fund* and *Employers Ins. Co.,* defendant's settlement with Scotts did not extinguish the equitable contribution duty. To hold otherwise would allow defendant to avoid its share of the defense burden by separately settling with the insured. Instead, under existing decisional authority, and applying an equitable solution, defendant reasonably may argue the amount it paid to Scott in settlement should be taken into account in allocating defense costs among the insurers. Defendant's reliance on cases where no coverage obligation arose is inapposite. (See *American Continental Ins. Co. v. American Casualty Co.* (2001) 86 Cal.App.4th 929, 938-939 [no coverage obligation arose because insured never named or served as party defendant in underlying action]; *Golden Eagle Ins. Co. v. Insurance Co. of the West* (2002) 99 Cal.App.4th 837, 854 [insurance policy covered another, different insured]; *Great American West, Inc. v. Safeco, Inc.* (1991) 226 Cal.App.3d 1145, 1152-1153 [no contractual obligation to cover loss because contractual limitations period expired].) Defendant does not dispute that—but for its argument premised on the settlement—its policies extended to the asbestos exposure bodily injury claims against Scotts.

2. The *Timing* Of The Settlement

Defendant argues it had no equitable contribution duty because it settled with Scotts *before* the underlying lawsuits were filed. But the timing of its settlement with the insured did not preclude an equitable contribution duty. (*Employers Ins. Co., supra*, 141

Cal.App.4th at p. 405; see *Maryland Cas. Co. v. W.R. Grace & Co., supra,* 218 F.3d at pp. 211-212 .) In *Employers Ins. Co.,* as here, the defendant insurers had settled with the insured *before* the underlying lawsuits were filed. The defendants attempted to distinguish *Fireman's Fund* on the ground their settlement with the insured *preceded* the underlying lawsuits. The defendants argued, by contrast, that in *Fireman's Fund* the settlement was reached *after* the underlying lawsuits were filed.

The Court of Appeal unequivocally rejected the proffered distinction: "It is a distinction without a difference. Neither the language nor reasoning of *Fireman's Fund* suggests that a settling insurer is only responsible for contribution to another for costs of defending cases pending at the time of settlement. Defendants also suggest that, unlike *Fireman's Fund,* they never had a contemporaneous 'equal obligation' with Wausau to their insured. But defendants' obligation to their insured arose long ago: long before the . . . releases and the [bodily injury and property damage] actions were filed. [Citations.] At the time of loss, each insurer had a potential obligation to defend and indemnity [the insured] against claims that might arise from a toxic discharge. We are not persuaded that defendants' equitable obligation to share the cost of that defense depends on whether they settled with their insured before, or after, the [bodily injury and property damage] suits were filed." (*Employers Ins. Co., supra,* 141 Cal.App.4th at p. 405.) Here, also, at the time of the alleged losses, both plaintiff and defendant had a potential obligation to defend and indemnify Scotts against such claims. Defendant's equitable obligation to plaintiff—to share the cost of Scotts's defense—does not turn on the timing of the settlement. (*Id*. at p. 405; see *Fireman's Fund, supra*, 65 Cal.App.4th at p. 1289.)

3. The *Effect* Of The Settlement

Defendant asserts the plain language of the parties' "other insurance" clauses preclude contribution by defendant. We disagree. The parties' "other insurance" clauses state in part: "[T]he Company shall not be liable for a greater proportion of such loss than the applicable limits of liability under this policy for such loss bears to the total applicable limit of liability of all *valid and collectible* insurance against such loss." (Italics added.) The general purpose of an "other insurance" clause is to limit an insurer's liability where other insurance coverage exists and to prevent multiple recovery by the insured. (*Dart Industries, Inc. v. Commercial Union Ins. Co.*, *supra*, 28 Cal.4th at pp. 1078, fn. 6 & 1079; *Edmondson Property Management v. Kwock* (2007) 156 Cal.App.4th 197, 203; *Carmel Development Co. v. RLI Ins. Co.* (2005) 126 Cal.App.4th 502, 508; *Fireman's Fund, supra,* 65 Cal.App.4th at p. 1293.) When multiple insurance policies are triggered on a single claim, liability among the insurers is apportioned pursuant to the "other insurance" clauses and the equitable contribution doctrine. (*Dart Industries, Inc. v. Commercial Union Ins. Co., supra,* 28 Cal.4th at p. 1080; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1856.) Under the contract language at issue here, if there is other valid and collectible insurance, an insurer is not liable for more than its pro rata share. (See *Continental Cas. Co. v. Zurich Ins. Co.*, *supra*, 57 Cal.2d at p. 34; *Pacific Indem. Co. v. Bellefonte Ins. Co.* (2000) 80 Cal.App.4th 1226, 1234-1235; *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co.* (1999) 75 Cal.App.4th 739, 743-744.)

Defendant argues: "Both [defendant's] and [plaintiff's] policies . . . contain 'other insurance' clauses which evidence the carriers' expectations respecting allocation of liability for a loss among themselves and other insurers. In each of those policies, the 'other insurance' clause makes clear that any allocation of insurance obligations can be made, if at all, only against other 'valid and collectible' insurance. . . . [¶] In this case, [defendant's] policies do not constitute 'valid and collectible' insurance of Scotts by virtue of its settlement with, and release from, Scotts." We are unpersuaded by defendant's argument.

First, under California law, contribution is generally required where there is the same level of insurance, both primary or both excess, for the same risk, regardless of "other insurance" policy language. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.*, *supra*, 28 Cal.4th at p. 1080; *Edmondson Property Management v. Kwock*, *supra,* 156 Cal.App.4th at p. 203; *CSE Ins. Group v. Northbrook Property & Casualty Co.*

(1994) 23 Cal.App.4th 1839, 1845; *Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co., supra,* 75 Cal.App.4th at p. 745.) In *Dart Industries, Inc.*, our Supreme Court stated, "[T]he modern trend is to require equitable contributions on a pro rata basis from all primary insurers regardless of the type of 'other insurance' clause in their policies." (*Dart Industries, Inc. v. Commercial Union Ins. Co., supra,* 28 Cal.4th at p. 1080; accord, *Edmondson Property Management v. Kwock, supra,* 156 Cal.App.4th at p. 203.) This is because public policy favors apportionment among coinsurers. (*Edmondson Property Management v. Kwock, supra,* 156 Cal.App.4th at p. 203; *CSE Ins. Group v. Northbrook Property & Casualty Co., supra,* 23 Cal.App.4th at p. 1845.)

Second, defendant's settlement with Scotts did not render its insurance invalid or uncollectible. The Court of Appeal has noted: "The clause 'valid and collectible insurance' has widespread use in the insurance industry of the United States and has a well established meaning. Generally, the clause refers to insurance which is legally valid and is underwritten by a solvent carrier. Thus, reference to other 'valid and collectible insurance' in a pro rata clause of a personal liability policy is directed to a policy which is legal and valid, as distinguished from one which is invalid, as for fraud, or uncollectible, as for insolvency. [Citation.]" (*Hellman v. Great American Ins. Co.* (1977) 66 Cal.App.3d 298, 304; accord, *Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 63 ["The term 'other valid and collectible insurance' simply means another policy which is legally valid and underwritten by a solvent carrier"]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 899.) In *Employers Ins. Co.,* the defendant insurers argued their settlement with the insured modified the insurance policies to reflect, as mutually intended, that the coverage was exhausted, and therefore they had no equitable contribution duty. (*Employers Ins. Co., supra,* 141 Cal.App.4th at pp. 406-407.) The Court of Appeal disagreed: "[M]erely saying a policy is exhausted does not make it so. While [the insured] and the settling insurers were free to agree as between themselves to 'deem' their policy limits 'exhausted,' just as they were free to settle their coverage dispute between themselves, there is no evidence that the settlements *actually* exhausted the coverage available under the policies; to the contrary, defendants stipulated before trial that they would not assert that any of the relevant policy limits were exhausted." (*Id.* at p. 406.) Here, by the same token, the settlement between defendant and Scotts did not render the applicable coverage invalid or uncollectible. Merely characterizing the coverage as terminated, invalid, or uncollectible does not make it so. Scotts agreed to give up its right to a defense or indemnity from defendant in return for $325,000. That agreement did not extinguish defendant's obligation to equitably share with plaintiff in the cost of Scotts's defense. To hold that it did would inequitably allow defendant to avoid its insuring obligations and force plaintiff to bear the full burden of Scotts's defense. We conclude defendant's policy covering Scotts did not become invalid or uncollectible within the meaning of the "other insurance" clause as applied in an equitable contribution context as a result of defendant's settlement.

C. The Public Policy In Favor Of Settlement

Defendant argues we should decline to follow *Employers Ins. Co.* because that decision "subverts the strong policy preference" for resolution of disputes by settlement. That argument is answered in *Employers Ins. Co.*: "Defendants contend that applying *Fireman's Fund* here will contravene public policy by discouraging insurers from settling with their insureds. But balanced against the societal interest in encouraging settlements are other public policy interests and the equitable concerns underlying the well-established rule of contribution between insurers. As stated in *Fireman's Fund* 'the reciprocal contribution rights of coinsurers who insure the same risk are based on the equitable principle that the burden of indemnifying or defending the insured with whom each has independently contracted should be borne by all the insurance carriers together, with the loss equitably distributed among those who share liability for it in direct ratio to the proportion each insurer's coverage bears to the total coverage provided by all the insurance polic[i]es.' (*Fireman's Fund, supra,* 65 Cal.App.4th at p. 1294.) Defendants provide no authority for their ipse dixit claim that policies favoring the encouragement of settlements militate a rule that would permit a coinsurer to evade its share of the defense burden by separately settling with its insured. Nor is there evidence before us that the *Fireman's Fund* rule in fact discourages settlement." (*Employers Ins. Co., supra,* 141 Cal.App.4th at p. 406.) We agree with the foregoing cogent analysis.

D. Notice of Potential Contribution Liability

Defendant contends, citing *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 978-982, that the judgment should be reversed because plaintiff did not submit admissible evidence the asbestos exposure bodily injury cases were tendered to defendant or that defendant had notice of those claims. We conclude defendant had notice of the underlying claims. In *Truck Ins. Exchange,* Division One of the Court of Appeal for this appellate district posed the question, "[*W*]*hen* does an insurer that is providing a defense have to raise the issue of contribution with potential coinsurers that are not participating in the litigation due to a lack of tender." (*Id.* at pp. 978-979.) The Court of Appeal rejected the assertion notice to potential coinsurers was unnecessary until the underlying action was concluded. (*Id.* at p. 979.) The Court of Appeal observed that without prompt notice of potential liability for contribution, a coinsurer cannot investigate the matter and decide whether to join in the defense. (*Id.* at pp. 979-981.) The Court of Appeal concluded: "[T]he defense of the [underlying] cases was tendered to Truck. Because the cases were not tendered to Unigard, Truck should have notified Unigard of the potential for contribution. The notice should have been made promptly after Truck agreed to provide a defense. That is not to say that Truck had to tender the defense to Unigard. A simple notice regarding the possibility of contribution would have been sufficient." (*Id.* at pp. 981-982, fn. omitted.) Moreover, the Court of Appeal concluded, because Truck did not notify Unigard of the underlying action, Truck was not entitled to contribution from Unigard. (*Id.* at p. 982.)

American Internat. Specialty Lines Ins. Co. v. Continental Casualty Ins. Co. (2006) 142 Cal.App.4th 1342, 1366-1367, is to the same effect. There, two insurers settled an action against their insured. Then, for the first time, the two settling carriers sought contribution from a third insurer. The third insurer had no prior notice of the action. Division Two of the Court of Appeal for this appellate district held the two carriers who settled the action against the insured could not recover a contribution from the third insurer. (*Ibid.*) The settling insurers had not notified the third insurer of its potential liability to contribution prior to the settlement. Therefore, our Division Two colleagues held the two settling carriers "'should not be permitted to drag [the third insurer] into the picture'" after the resolution of the insured's claim. (*Id.* at p. 1366.)

The present case is distinguishable. Plaintiff filed its cross-complaint seeking contribution from defendant on July 14, 2005. This was after Scotts sought a defense and indemnity from plaintiff. But plaintiff did not agree to defend Scotts until February 24, 2006—7 months and 10 days after Scott sought a defense and indemnity. Hence, defendant was on notice plaintiff sought equitable contribution. Notice was provided via the cross-complaint before plaintiff agreed to provide a defense. Further, defendant's counsel conceded in the trial court that his client knew the underlying cases had been brought against Scotts; defendant took the position it had no duty to defend. Defendant's counsel stated in open court: "What happened was apparently there were some tenders. . . . [¶] [And we said] sorry, we have a valid defense to coverage, we do not have to defend . . . ." (See California Insurance Law Handbook (2008 ed.), section 59:16 ["A liability insurer's failure to notify a co-insurer of a lawsuit against their insured upon undertaking the insured's defense precludes the insurer from later seeking contribution from the co-insurer, *where the co-insurer did not know, and had no reason to know, about the lawsuit against [the] insured*"]; accord, Croskey, et al., Cal. Practice Guide: Insurance Litigation, ¶¶ 8:102- 8:104; California Insurance Law Handbook, *supra,* § 21:13.) Defendant had notice of the asbestos exposure bodily injury claims against Scotts at the time (if not sooner) that plaintiff's contribution claim arose. And this occurred when plaintiff agreed to defend Scotts.

E. Allocation of Defense Costs

The trial court granted summary judgment as to the allocable defense costs. We agree with plaintiff that defendant has waived the right to challenge the amount of costs. Defendant waived that right when it refused to participate in the defense of the underlying litigation. (*Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874, 880; *Travelers Casualty & Surety Co. of America v. Century Surety Co.* (2004) 118 Cal.App.4th 1156, 1159.)

We agree with defendant that plaintiff failed to sustain its initial burden of production at the summary judgment stage of determining the proper allocation method. The allocation of defense costs is a matter of equity which necessarily involves the weighing of competing considerations. Our Supreme Court has explained: "We expressly decline to formulate a definitive rule applicable in every case in light of varying equitable considerations which may arise, and which affect the insured and the primary and excess carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers. (Cf. *Gray* [*v. Zurich Insurance Co.* (1966)] 65 Cal.2d [263,] 276-277.) Moreover, we affirm the wisdom expressed in *Amer. Auto. Ins. Co. v. Seaboard Surety Co*. (1957) 155 Cal.App.2d 192, 195-196: 'The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other. . . . Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.'" (*Signal Companies, Inc. v. Harbor Ins. Co., supra,* 27 Cal.3d at p. 369; accord *CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 619.) A trial court must apply the equitable considerations on a case-by-case basis. (*Signal Companies, Inc. v. Harbor Ins. Co., supra,* 27 Cal.3d at p. 369; *CNA Casualty of California v. Seaboard Surety Co., supra,* 176 Cal.App.3d at p. 619.) A trial court does not abuse its discretion so long as the allocation formula it applies is "on the whole, fair and reasonable." (*CNA Casualty of California v. Seaboard Surety Co., supra,* 176 Cal.App.3d at p. 620.) The

Court of Appeal has held: "While there is no single required method of apportionment, the ultimate goal of equitable contribution must be 'to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to prevent one insurer from profiting at the expense of others.'" (*Maryland Cas. Co. v. Nationwide Mutual Ins. Co., supra,* 81 Cal.App.4th at p. 1094; accord *Monticello Ins. Co. v. Essex Ins. Co.*, supra, 162 Cal.App.4th at p. 1386.)

There are various methods of allocating costs among insurers. The Court of Appeal has explained: "[T]he courts have adopted a number of different ways of apportioning the burden among multiple insurers. These various methods have included, among others, the following: (1) apportionment based upon the relative duration of each primary policy as compared with the overall period of coverage during which the 'occurrences' 'occurred' (the 'time on the risk' method) [citations]; (2) apportionment based upon the relative policy limits of each primary policy (the 'policy limits' method) [citations]; (3) apportionment based upon *both* the relative durations and the relative policy limits of each primary policy, through multiplying the policies' respective durations by the amount of their respective limits so that insurers issuing primary policies with higher limits would bear a greater share of the liability per year than those issuing primary policies with lower limits (the 'combined policy limit time on the risk' method) [citation]; (4) apportionment based upon the amount of premiums paid to each carrier (the 'premiums paid' method) [citation]; (5) apportionment among each carrier in equal shares up to the policy limits of the policy with the lowest limits, then among each carrier other than the one issuing the policy with the lowest limits in equal shares up to the policy limits of the policy with the next-to-lowest limits, and so on in the same fashion until the entire loss has been apportioned in full (the 'maximum loss' method) [citation]; and (6) apportionment among each carrier in equal shares (the 'equal shares' method) [citation]." (*Centennial Ins. Co. v. United States Fire Ins. Co.*, (2001) 88 Cal.App.4th 105, 112-113; accord, *Stonewall Ins. Co. v. City of Palos Verdes Estates, supra,* 46 Cal.App.4th at pp. 1861-1862.) Such equitable issues are rarely resolvable at the summary judgment stage. Thus, the October 17, 2007 order granting summary judgment is reversed.

IV. DISPOSITION

The December 18, 2006 order granting summary adjudication is affirmed. The order granting summary judgment is reversed. Plaintiff, Employers Insurance Company of Wausau, is to recover its costs on appeal from defendant, Pacific Employers Insurance Company.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

KRIEGLER, J.

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MOSK, J., Dissenting

I respectfully dissent.

I agree that defendant had a duty to contribute, although I believe the issue is not an easy one. But in my view, the trial court's exercise of its discretion in making an equitable apportionment on summary judgment when there were no disputed issues of fact should also be affirmed.

I do not agree that a trial court's exercise of its equitable powers to decide apportionment is not generally done by way of summary judgment. (See, e.g., *Travelers Casualty & Surety Co. v. Century Surety Co.* (2004) 118 Cal.App.4th 1156.) In this case, plaintiff did submit in its summary judgment motion a prima facie case as to the apportionment. It provided the applicable policies and the computations based on its theory of the proper allocations. Contrary to defendant's suggestion, the trial court did consider the Liberty Mutual policy.

In connection with its opposition to the summary judgment motion, defendant did not refer in its separate statement or points and authorities to any disputed fact in connection with apportionment. It simply denied that it had any obligation to contribute. Basically, defendants argued that the trial court should exercise its discretion by taking into account Liberty Mutual policies, using an "equal share" or years on risk approach and should employ a per occurrence rather than aggregate limits factor. The trial court stated that it found that the equitable allocation should be determined by the "hybrid" approach set forth in *Armstrong World Industries v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1. Oral argument on the issue appeared to be perfunctory. Defendant proposed an equal allocation between it, plaintiff and Liberty Mutual. The court rejected that proposal and adopted plaintiff's theory. As to the specific costs for which contribution was to be made, the parties sparred over the reasonableness of certain costs.

Defendant, in its briefs on appeal did not specify any disputed issues of fact. Looking at defendant's list of "issued presented," one can search in vain for any suggestion that summary judgment was inappropriate because of the existence of disputed issues of fact. Only when this court—based on no suggestion by the parties—requested further briefing on the issue of whether apportionment should have been decided by summary judgment, and especially whether the matter should be remanded, did defendant submit an argument that there were areas that should be explored further.

It appears that defendant concentrated on avoiding liability entirely and not on the remedy. Perhaps it should suffer the consequences. It is not enough to say that the trial court should go back, have a trial, and reexamine its equitable apportionment decision, without specifying what disputed facts were submitted by the parties and were not resolved. Just to say that the trial court should consider other theories—theories that were already submitted to it—is not a basis for overturning a decision on equity.

If this court believes that the trial court's decision was unsupported by evidentiary support and correct legal principles, or the trial court did not consider all the material facts, then this court should rule that there was an abuse of discretion. (See, e.g., *Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 447.)

Moreover, defendant has not set forth that the remedy constituted a miscarriage of justice. (Cal. Const., art. VI, § 13.) It has not suggested the result of any of its proposed apportionments or what any additional facts would compel a different apportionment.

Maybe a reexamination of the apportionment with more evidence and more argument would be desirable. But I can see no appropriate legal theory to give defendant a second chance at this stage. It seems to me that the trial court followed the rules, examined the evidence before it, and exercised its equitable discretion based on undisputed facts. I cannot say it abused its discretion. Accordingly, I would affirm the judgment in its entirety.

MOSK, J.